No. 15016

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SALOMON R. SANDEZ, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbooks

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To the Honorable Dal M. Lemmon, James Alger Fee, and Stanley N. Barnes:

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal, the judgment on appeal herein having been dated November 28, 1956, and an extension of time for filing of this petition having been granted to January 26, 1957.

The Language of the Opinion May Be Misinterpreted as a Repudiation of a Well-Established Principle.

It is our firm belief that this Court did not intend to repudiate the established principle that under proper circumstances the acts and declarations of a conspirator are

competent evidence in a crime charging a substantive offense, when such offense is participated in by two or more persons and the act or declaration is shown to be that of a participating confederate. This principle we respectfully request the Court to discuss.

Preliminary Statement.

This Court has affirmed the conviction of Appellant Sandez as to Count 10, the conspiracy count. This Court has reversed the conviction of Sandez, charged with two substantive counts, namely, Count 8, relating to importation, and Count 9, relating to transportation of narcotics. This Court has, among other things, in its opinion probably quite properly held that under the facts of this case there was not sufficient corroboration of the admissions made by Sandez to corroborate the substantive counts.

Discussion and Argument.

In this petition for rehearing we are not challenging the reversal had of the two substantive counts, *i. e.,* Counts 8 and 9; but we are asking that clarification be had so that the language of this opinion may not be construed as a repudiation of the established principle of law that under proper circumstances a declaration and acts of a confederate are applicable in proof of a substantive count, and that such principle is not confined to prosecutions for conspiracy.

In the slip opinion of this Court, on page 11 thereof, the following is noted:

> "Conversation Number 1, made by a conspirator during the course of the conspiracy would be binding on Sandez insofar as Count 10 is concerned. *but not as to the substantive counts.*" (Emphasis ours.)

The opinion further refers to this subject in the first full paragraph on page 18 of the slip opinion, the last page.

The conversation there referred to is designated on page 8 of the opinion as "Conversation Number 1." This is the conversation that occurred in the morning of April 15, 1955, in a room of the Constance Hotel in Pasadena, California. It pertained to a conversation between the co-conspirator Perno, and the narcotic agent, the witness Katz.

It is to be observed that the defendant Perno was not named as a defendant in the substantive counts 8 and 9. It is our view that, despite the fact that he was not so named as a defendant therein, still his act and declaration then and there made could be binding as an act or declaration of one of the parties in reference to a common criminal object, where as here, two or more persons are associated together for the same illegal purpose.

It is, however, also our view that *in this case* one trial, namely, by an oversight or omission on the part of the prosecutor to specifically call the Court's attention to the theory of the Government's case in connection with this declaration of Perno, and to submit to the Court appropriate instructions which clearly presented to the jury the principle of law that declarations of a confederate are not confined to prosecutions for conspiracy alone, that the reversal on these counts was proper, and that under such circumstances the conversation designated as "Conversation Number 1" should not be construed to bolster the evidence as to the substantive counts that this Court has recently reversed.

It appears, however, that since this Court and other Federal Courts have for years applied the rule that the declarations of a confederate, or one found to be occupying a position similar to a co-conspirator, are properly admissible against another where the charge is only that of a substantive offense, we suggest that if this Court deems it proper to grant this petition for a rehearing the language of the opinion be clarified so that it will not be construed as a repudiation of this rule.

The rule, as we understand it, has been succinctly stated as:

> "The notion that the competency of the declaration of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."
>
> *United States v. Olweiss* (2 Cir. 1943), 138 F. 2d 798, 799, 800, cert. den. 321 U. S. 744.

Or, as otherwise stated, it seems to be generally held that a conspiracy may be shown, so as to render admissible evidence of the acts or statements of a confederate or co-conspirator, although no conspiracy is charged in the indictment.

In our initial "Appellee's Brief" commencing on page 34 we have collected a group of cases which we feel supports this proposition under the sub-heading:

> "A. Declarations of Confederates are not Confined to Prosecutions for Conspiracy."

Without repeating the authorities there noted, and with the desire to not unduly burden this petition, it is never-

theless thought helpful to submit the following discussion and authorities concerning this proposition: 11 *American Jurisprudence,* p. 568; *Conspiracy,* Sec. 37.

". . . The rule seems to be well established that, upon the trial of an indictment for a crime, evidence is admissible to prove a conspiracy to commit the crime charged, although the conspiracy is not charged in the indictment. This is permitted not for the purpose of allowing a conviction for a crime not specifically charged, but merely to show the intent with which the parties acted.[11] Furthermore, it has been held that the crime contemplated by the conspiracy need not be the identical offense charged in the indictment or even a similar one, if the offense charged in the indictment is one which might have been contemplated as a result of the conspiracy.[12]

"Evidence of a conspiracy between the defendant and other persons has been held to be admissible although the other conspirators are not joined in the indictment or information and no conspiracy is charged therein.[13] Consequently, since evidence to show a conspiracy to commit the crime charged in an information may be admitted without any averment of conspiracy, an allegation in an information for robbery to the effect that the defendant entered into a conspiracy with certain named persons for the commission of the offense may be treated as surplusage and evidence may be introduced showing a conspiracy between the defendant and persons other than those named in the information.[14] . . ."

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[11]Citing various state cases.

[12]Annotation: 66 A. L. R. 1312.

[13]Annotation: 66 A. L. R. 1312.

[14]Annotation: 66 A. L. R. 1313.

We also invite attention to a discussion of this subject contained in 66 *A. L. R.* 1311: *Annotation.* Instruction on evidence as to conspiracy where there is no charge of conspiracy in indictment or information, page 1312.

> "Evidence of a conspiracy between the defendant and other persons has been held to be admissible, although the other conspirators are not joined in the indictment or information, and no conspiracy is charged therein. *State v. Ruck* (1906), 194 Mo. 416, 92 S. W. 706, 5 Ann. Cas. 976 (assault with intent to kill); *State v. Kennedy* (1903), 177 Mo. 98, 75 S. W. 979 (murder); *State v. Sykes* (1905), 191 Mo. 62, 89 S. W. 851 (rape); And see *Gill v. State* (1894), 59 Ark. 422, 27 S. W. 598, *infra.* But see *Taylor v. Com.* (1906), 28 Ky. L. Rep. 819, 90 S. W. 581, *infra,* III."

And at 1313:

> "It is generally held that a conspiracy may be shown, so as to render admissible evidence of the acts or statements of the defendant's co-conspirators, although no conspiracy is charged in the indictment or information. (Citing cases.)"

The rule as here discussed has been cited in various civil and criminal cases since the date of its rendition, and various reasons have been given for it. Some base it on conspiracy, even though not alleged, others base it on the principle of *res gestae,* and still others on agency or partnership.

In *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, at 249:

> ". . . In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that

there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. . . . (Citing cases.)"

In *Tuckerman v. United States* (6 Cir. 1923), 291 Fed. 958, 970, the Court said:

". . . It is the general rule that where two or more persons are associated for the same illegal purpose, and even where the indictment does not charge conspiracy, any act or declaration of one of the parties in reference to the common object, and forming part of the *res gestae,* may be given in evidence. *American Fur. Co. v. U. S.*, 2 Pet. 358, 365, 7 L. Ed. 450; *Nudd v. Burrows,* 91 U. S. 426, 23 L. Ed. 286."

Cossack v. United States (9 Cir. 1936), 82 F. 2d 214, cert. den. 298 U. S. 678, at page 216, quotes from the language of the *Vilson* case (61 F. 2d 901, C. A. 9, 1932), and continues:

"When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while

the same is in progress, are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. * * * The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to the common object is, in contemplation of law, the act or declaration of all. * * * 16 C. J. sec. 1283, p. 646.

"The common object of persons associated for illegal purposes forms part of the *res gestae,* and acts done with reference to such object are admissible, though no conspiracy is charged. *Vilson v. U. S.,* (*supra*); *Sprinkle v. U. S.* (C. C. A.), 141 Fed. 811."

Accord:

Coplin v. United States (9 Cir. 1937), 88 F. 2d 652, 661;

Beldon v. United States (9 Cir. 1951), 223 Fed. 726, 730;

United States v. Food & Grocery Bureau (So. Cal. 1942), 43 Fed. Supp. 966, 969.

In the case of *Lee Dip v. United States,* 92 F. 2d 802, 803 (C. A. 9, 1937), which concerns itself with a narcotic offense:

". . . Had the two been jointly indicted, the evidence complained of would have been properly admitted as against both. No conspiracy was charged, but there was sufficient evidence from which to infer that one existed in fact. Where there is proof of concert of action between two or more persons in the

commission of an offense, the acts and declarations of one are admissible against the other, although no conspiracy has been charged. Robinson v. United States (C. C. A. 9), 33 F. (2d) 238; Sprinkle v. United States (C. C. A. 4), 141 F. 811; Vilson v. United States (C. C. A. 9), 61 F. (2d) 901; Cossack v. United States (C. C. A. 9), 82 F. (2d) 214."

To similar effect:

Shockley v. United States (C. A. 9, 1948), 166 F. 2d 704, at p. 715;

Davis v. United States (C. A. 5, 1926), 12 F. 2d 253, at p. 257.

Conclusion.

It is respectfully suggested that if this Honorable Court grants a rehearing, which is here sought, that a subsequent opinion discuss the principle that, under proper circumstances, the acts and declarations of a confederate are competent evidence in offenses other than conspiracy.

Respectfully submitted,

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Attorneys for Appellee.

Certificate of Counsel.

Norman W. Neukom, one of the Attorneys for the Appellee, hereby certifies that in his opinion the above petition for rehearing is well founded and is not interposed for delay.

NORMAN W. NEUKOM.